IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.554 of 2005

IN

SUMMARY SUIT NO.285 OF 2001

SICOM LIMITED. ...Plaintiff

vs.

1.Prashant Surendra Tanna
and others. ...Defendants.

Mr.P.V.Shah, for Plaintiff.

Mr.B.B.Saraf i/b. Mr.A.G.Shah, for Defenant no.1 in support.

CORAM: D.K.DESHMUKH,J.

DATED: 20th April, 2006.

P.C.:-

1. This is a notice of motion taken out by defendant no.1 for setting aside a decree passed by this Court in the suit filed under Order 37 of the Code of Civil Procedure. A decree has been passed against the defendant no.1 on 2.4.2004. Admittedly, the defendant no.1 was a guarantor and the principal

debtor was one M/s.Suprapti Plastics Ltd. The said M/s.Suprapti Plastics Ltd. had filed a reference with Board for Industrial and Financial Reconstruction (B.I.F.R.) and the said reference was registered with B.I.F.R on 3.3.2004. The plaintiff was aware of that fact and therefore, the plaintiff had written a letter on 9.3.2004 to the principal debtor stating that because a reference of the principal debtor is registered with B.I.F.R., the plaintiff is not proceeding against the principal debtor under the provisions of State Financial Corporation Act (S.F.C.Act). According to the defendant no.1 in view of the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act,1985 and in view of the judgment of the Supreme Court in the Case "M/s.Patheja Brothers forgings & Stamping & another Vs. I.C.I.C.I. Ltd. & others, 2000(4) Bombay C.R. 13" this Court did not have jurisdiction to pass a decree against a guarantor of the principal debtor whose reference was registered before that date with the BIFR, and therefore, the decree which is passed under the provisions of Order 37 of C.P.C. by the Court which did not have jurisdiction, is liable to be set aside.

2. On behalf of the plaintiff the fact that the

Reference of the principal debtor was registered before the B.I.F.R. before the date on which the decree was passed, is not disputed. It is, however, contended that the registration of Reference of the principal debtor before B.I.F.R. is not valid. It is also contended that this Court did not have jurisdiction to pass a decree on 2.4.2004 in view of the provisions of Section 22 of Sick Industrial Companies Act, it is not a special circumstance within the meaning of Rule 4 Order 37 of C.P.C. In support of this submission reliance is placed on the judgment of the Supreme Court in the Case “Rajni Kumar Vs. Suresh Kumar Malhotra & Another, 2003(3) SCALE 434”.

3. From the documents on record, it is established that the suit was filed against defendant no.1 in its capacity as guarantor of a company by name M/s.Suprapti Plastics Ltd. It is also established from the documents on record that the reference of that company was received by B.I.F.R. on 24.1.2004 and it was registered on 30.1.2004. It is also established that acting on the registration of reference of the Company, by letter dated 9.3.2004 the plaintiff informed the company that in view of

the registration of its reference before BIFR, the action for taking over the possession of the properties of the principal debtor under Section 29 of the State Financial Corporation Act is postponed until further notice. Thus, it is clear that the plaintiff had acted on the registration of the reference of the principal debtor. Thus, really speaking therefore, the effect of the registration of the Reference of the principal debtor before BIFR, in view of the judgment of the Supreme Court in the case "M/s.Patheja Brothers forgings & Stamping & another Vs. I.C.I.C.I. Ltd. & others, 2000(4) Bombay C.R. 13", was to oust the jurisdiction of this Court to proceed further in the suit of the plaintiff till that Reference was pending. It was the duty of the plaintiff to inform the Court that the Reference of the principal debtor is registered with the BIFR and therefore, this Court cannot pass a decree against the guarantor of the principal debtor i.e. defendant no.1. But the plaintiff has chosen to suppress this relevant fact from the Court and has obtained a decree. It is pertinent to note that though it is submitted by the plaintiff that registration of the reference of the principal debtor was not valid, it is clear from its letter dated 9.3.2004 that the

plaintiff was acting on that registration and was staying its hands in so far as action against the principal debtor is concerned. It is nowhere explained as to why if the registration of the reference of the principal debtor is not valid, the plaintiff has not proceeded against the principal debtor. If according to the plaintiff, this Court could have proceeded to hear the suit even after registration of the reference, it should have informed the Court that the reference of the principal debtor Company has been registered and then contended that still the Court can continue to hear the suit. It is clear from the judgment of the Supreme Court in case “Rajni Kumar Vs. Suresh Kumar Malhotra & Another, 2003(3) SCALE 434” relied on by the plaintiff that the factor that the Court did not have jurisdiction to pass a decree is a relevant circumstance to be considered by the Court while considering application under Rule 4 Order 37 of C.P.C. In my opinion, if the Court did not have jurisdiction to pass a decree on that date, the ground that the decree is without jurisdiction could have been set up by the judgment debtor even before the executing Court where the decree is put for execution. If the executing Court finds that the

decree is passed without jurisdiction then the executing Court can decline to execute that decree. If the Executing Court can refuse to execute the decree which is passed without jurisdiction, in my opinion, then why there is no reason the Trial Court which passed the decree cannot recall the decree which the Court did not have the jurisdiction to pass. In my opinion, therefore, really speaking the conduct of the plaintiff of suppressing material fact that the reference of the principal debtor is registered with the BIFR, from the Court and obtaining decree, is really amount abuse of the process of Court and therefore, the decree is liable to be recalled by the Court even in exercise of its inherent power under Section 151 of the Civil Procedure Code in order to prevent abuse of the process of the Court. It was also contended on behalf of the plaintiff that as the notice of motion is for setting aside the ex-parte decree, it is filed beyond the period of limitation. But in view of the judgment of the Division Bench in the case “P.N.Films Ltd. and another Vs. Overseas Films Corporation Ltd., AIR 1958 Bombay 10” the said submission has no substance. For filing application under Rule 4 Order 37 of C.P.C. Article 181 of the

Limitation Act applies.

4. Taking overall view of the matter therefore, in my opinion, it is not only necessary but it would be in the duty of this Court to recall the decree which it had no jurisdiction to pass on the date on which that decree was passed. The notice of motion is therefore, granted in terms of prayer clause (a). The notice of motion is disposed of

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